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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV12

0197

HRL

RON SAGER, individually and on behalf of a
class of similarly situated individuals,

Plaintiff,

v.

BANK OF AMERICA CORPORATION, a
Delaware corporation, SOUNDBITE
COMMUNICATIONS, INC., a Delaware
corporation,

Defendants.

) Case No.

) **CLASS ACTION COMPLAINT**
) **FOR DAMAGES AND**
) **INJUNCTIVE RELIEF**

) DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

Plaintiff Ron Sager brings this class action complaint against Defendants Bank of America Corporation (hereinafter "Bank of America") and Soundbite Communications, Inc. ("Soundbite") to stop Defendants' practice of making unsolicited text message calls to cellular telephones, and to obtain redress for all persons injured by its conduct. This Court has jurisdiction over this class action pursuant to 28 U.S.C. § 1332(d). Plaintiff, for his class

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

ORIGINAL

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1 action complaint, alleges as follows upon personal knowledge as to himself and his own acts
2 and experiences, and, as to all other matters, upon information and belief, including
3 investigation conducted by his attorneys.

4 5 NATURE OF THE CASE

6 1. Wireless spam is a growing problem in the United States. According to a
7 recent study conducted by the Pew Research Center, "Spam isn't just for email anymore; it
8 comes in the form of unwanted text messages of all kinds—from coupons to phishing
9 schemes—sent directly to user's cell phones." In fact, "57% of adults with cell phones have
10 received unwanted or spam text messages on their phone." Amanda Lenhart, Cell Phones
11 and American Adults: They Make Just as Many Calls, but Text Less than Teens, Pew
12 Research Center (2010) at <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx>.
13

14 2. In one such effort to promote its banking services, Defendant Bank of
15 America, one of the nation's largest banks, engaged Defendant Soundbite to conduct an
16 especially pernicious form of solicitation: the transmission of unauthorized advertisements,
17 in the form of "text message" calls to the cellular telephones of consumers throughout the
18 nation.

19 3. By effectuating these unauthorized text message calls (hereinafter, "wireless
20 spam"), Defendants have caused consumers actual harm, not only because consumers were
21 subjected to the aggravation that necessarily accompanies wireless spam, but also because
22 consumers frequently have to pay their cell phone service providers for the receipt of such
23 wireless spam.

24 4. In order to redress these injuries, Plaintiff, on behalf of himself and a
25 nationwide class of similarly situated individuals, brings suit under the Telephone Consumer
26 Protection Act, 47 U.S.C. § 227, *et seq.* ("47 U.S.C. § 227"), which prohibits unsolicited
27 voice and text calls to cell phones.

6. Plaintiff is a citizen of Illinois.

8. Defendant Soundbite is a Delaware corporation who at all relevant times maintained its headquarters and principal place of business in Massachusetts. A self-proclaimed "global leader in on-demand, multi-channel communications," Soundbite is a national marketing company with customers throughout the United States, including this state.

9. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332, because (a) at least one member of the putative class is a citizen of a state different from the defendants, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

11. Venue is proper in this District under 28 U.S.C. § 1391(a) because Defendants
in this District and because a substantial part of the events giving rise to the claim
occurred in this District, as the Defendants' agent that transmitted the text message calls at

1 issue resides in this District.

2 **INTRADISTRICT ASSIGNMENT**

3 12. The conduct giving rise to this matter originated in the County of Santa Clara.
4 Under Local Rule 3-2(c), this civil action should be assigned to the San Jose division of the
5 Northern District of California.

6 **COMMON ALLEGATIONS OF FACT**

7 13. In recent years, marketers who often have felt stymied by federal laws
8 limiting solicitation by telephone, facsimile machine, and e-mail have increasingly looked to
9 alternative technologies through which to send bulk solicitations cheaply.

10 14. One of the newest types of such bulk marketing is to advertise through Short
11 Message Services. The term "Short Message Service" or "SMS" is a messaging system that
12 allows cellular telephone subscribers to use their cellular telephones to send and receive short
13 text messages, usually limited to 160 characters.

14 15. A "SMS message" is a text message call directed to a wireless device through
15 the use of the telephone number assigned to the device. When an SMS message call is
16 successfully made, the recipient's cell phone rings, alerting him or her that a call is being
17 received. As cellular telephones are inherently mobile and are frequently carried on their
18 owner's person, calls to cellular telephones, including SMS messages, may be received by
19 the called party virtually anywhere worldwide.

20 16. Unlike more conventional solicitations, SMS calls, and particularly wireless
21 spam, can actually costs their recipients money, because cell phone users must frequently pay
22 their respective wireless service providers either for each text message call they receive or
23 incur an usage allocation deduction to their text plan, regardless of whether or not the
24 message is authorized.

25 17. Over the course of an extended period beginning in at least 2009, Defendants
26 directed the mass transmission of wireless spam to the cell phones of consumers nationwide.

27 18. For instance, on or about March 16, 2009, Defendants called Plaintiff's
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1 cellular telephone number, which is assigned to a cellular telephone service for which
2 Plaintiff incurs a charge for incoming calls.

3 19. The "from" field of such transmission was identified cryptically as "70650,"
4 which is an abbreviated telephone number known as an SMS short code operated by
5 Defendant Soundbite. The body of such text message read:

6 BANK OF AMERICA FREE TEXT ALERT: TO AVOID
7 A SERVICE INTERRUPTION ON YOUR ACCOUNT,
8 PLEASE CALL 866-963-1064 BEFORE 9PM TODAY.
9 TO END ALERTS REPLY STOP.

10 20. Shortly after receiving the above message, Plaintiff replied "Stop," thereby
11 confirming he did not provide any prior express consent to Defendants to send such text
12 messages to his cellular telephone and rescinded any such prior consent should any have
13 existed.

14 21. Despite having expressly informed Defendants to discontinue the transmission
15 of text messages to his cellular telephone, Defendants sent yet another unsolicited text
16 message to Plaintiff that same day, which again originated from short code 70650 and read as
17 follows:

18 THANK YOU. YOU WILL NO LONGER RECEIVE
19 TEXT ALERTS FROM BANK OF AMERICA TO
20 THIS NUMBER. IF YOU HAVE QUESTIONS,
21 PLEASE CALL 866-963-1064.

22 22. At no time did Plaintiff consent to the receipt of such text message calls from
23 Defendants.

24 CLASS ACTION ALLEGATIONS

25 23. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure
26 23(b)(2) and Rule 23(b)(3) on behalf of herself and two classes (the "Classes") defined as
27 follows:

28 (i) Bank of America Class ("Bank of America Class") All persons in the United States
and its Territories who received one or more unauthorized text message solicitations
on behalf of Bank of America.

1 (ii) Soundbite Class ("Soundbite Class") All persons in the United States and its
2 Territories who received one or more unauthorized text message solicitations on
3 behalf of Soundbite.

4 24. The Classes consists of thousands of individuals and other entities, making
5 joinder impractical.

6 25. Plaintiff will fairly and adequately represent and protect the interests of the
7 other members of the Classes. Plaintiff has retained counsel with substantial experience in
8 prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to
9 vigorously prosecuting this action on behalf of the members of the Classes, and have the
10 financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those
11 of the other members of the Classes.

12 26. Absent a class action, most members of the Classes would find the cost of
13 litigating their claims to be prohibitive, and will have no effective remedy. The class
14 treatment of common questions of law and fact is also superior to multiple individual actions
15 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
16 promotes consistency and efficiency of adjudication.

17 27. Defendants have acted and failed to act on grounds generally applicable to the
18 Plaintiff and the other members of the Classes in transmitting the wireless spam at issue,
19 requiring the Court's imposition of uniform relief to ensure compatible standards of conduct
20 toward the members of the Classes.

21 28. The factual and legal bases of Defendants' liability to Plaintiff and to the other
22 members of the Classes are the same, resulting in injury to the Plaintiff and to all of the other
23 members of the Classes as a result of the transmission of the wireless spam alleged herein.
24 Plaintiff and the other Classes members have all suffered harm and damages as a result of
25 Defendants' unlawful and wrongful conduct as a result of the transmission of the wireless
26 spam.

27 29. There are many questions of law and fact common to the claims of Plaintiff
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1 and the other members of the Classes, and those questions predominate over any questions
 2 that may affect individual members of the Classes. Common questions for the Classes
 3 include but are not limited to the following:

4 (a) Does the wireless spam Defendants distributed violate 47 U.S.C. §
 5 227?

6 (b) Are the Classes' members entitled to treble damages based on the
 7 willfulness of Defendants' conduct?

8 **FIRST CAUSE OF ACTION**
 9 **(Violation of 47 U.S.C. § 227: On behalf of the Classes)**

10 30. Plaintiff incorporates by reference the foregoing allegations as if fully set
 11 forth herein.

12 31. Defendants made unsolicited commercial text calls, including the messages
 13 transcribed above, to the wireless telephone numbers of the Classes. Each such text message
 14 call was made using equipment that had the capacity to store or produce telephone numbers
 15 using a random or sequential number generator, and to dial such numbers. By using such
 16 equipment, Defendants were able to effectively send text messages simultaneously to tens of
 17 thousands of wireless telephone numbers without human intervention.

18 32. These text calls were made *en masse* through the use of a short code and
 19 without the prior express consent of the Plaintiff and the other members of the Class.

20 33. Defendants have, therefore, violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result
 21 of Defendants' illegal conduct, the members of the class suffered actual damages by, *inter*
 22 *alia*, having to pay their respective wireless carriers for the text messages where applicable
 23 and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of \$500.00 in
 24 damages for each violation of such act.

25 34. Should the Court determine that Defendants had knowledge that Plaintiff and
 26 the other members of the Classes did not consent to the receipt of the aforementioned
 27 wireless spam, the Court should, pursuant to section 47 U.S.C. § 227(b)(3)(C), treble the
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1 amount of statutory damages recoverable by the Plaintiff and the other members of the
2 Classes.

3 WHEREFORE, Plaintiff Ron Sager, on behalf of himself and the Classes, prays for
4 the following relief:

- 5 1. An order certifying the Classes as defined above;
- 6 2. An award of actual and statutory damages;
- 7 3. An injunction requiring Defendants to cease all wireless spam
8 activities;
- 9 4. An award of reasonable attorneys' fees and costs; and
- 10 5. Such further and other relief the Court deems reasonable and just.

11 **JURY DEMAND**

12 Plaintiff requests trial by jury of all claims that can be so tried.

13
14 Dated: January 11, 2012

Respectfully submitted,

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16 By: 

17 Sean P. Reis
18 EDELSON MCGUIRE, LLP
19 One of the Attorneys for RON SAGER,
individually and on behalf of
a class of similarly situated individuals

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